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**RESPONDENT HOWARD V. MISHLER'S OBJECTION
TO THE CERTIFIED REPORT OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE
OF THE SUPREME COURT OF OHIO**

Objection No. 1:

Where an attorney, a solo practitioner, (1) has a scheduling conflict and is unable to attend the deposition of his client and (2) hires another attorney not in his firm ("contracted attorney") to attend the deposition with the client, paying the contracted attorney an hourly rate, which payment is not dependent upon the client's payment of the fee to the hiring attorney, payment to the contracted attorney is considered an expense of the hiring attorney and not the unlawful division of a fee in violation of DR 2-107(A).

Respondent Howard Mishler's objection centers around the meaning of the phrase "division of fees" referenced in DR 2-107(A)¹ and whether, under the facts of this case, Mishler's payment to attorney Russell Ezolt constituted an expense subsumed as overhead and not the improper division of a fee.

¹ DR 2-107(A) provided:

Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

- (1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation;
- (2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;
- (3) The total fee is reasonable.

As Relator's investigation and prosecution involved conduct which occurred prior to February 1, 2007, the date on which the Rules of Professional Conduct replaced the Code of Professional Responsibility, the Code of Professional Responsibility govern these proceedings. Prof.Cond.Rule, Form of Citation, Effective Date, Application (b).

The substantive and undisputed facts pertaining to this objection are as follows:

Respondent, admitted to the practice of law in 1973, is essentially “self-employed” as the sole employee of Howard V. Mishler Co., LPA. (Tr. Vol. 1, p. 41, 42.) On occasions, Mishler contracted with what he called “a per diem attorney,” described as an attorney Mishler would “call on an as-needed.” (Tr. Vol. 1, p. 43.) One such “per diem” attorney was Russell Ezolt. (Tr. Vol. 1, p. 43, 144.) Ezolt first started working with Mishler in November 2003. (Tr. Vol. 2, p. 410.) Neither Mishler nor Ezolt represented Ezolt as a member of Howard V. Mishler Co., LPA. Report 9.² (Also see, Tr. Vol. 2, p. 428.) Likewise, no evidence was presented that Ezolt acted in an “of counsel” capacity to Howard V. Mishler Co., LPA.³

Mishler paid for Ezolt’s services on an hourly basis when billed by Ezolt and without regard to the outcome of the matter or the nature of the fee agreement between Mishler and Mishler’s client. (Tr. Vol. 1, p. 149, Tr. Vol. 2, p. 410-411.) Mishler called upon Ezolt when scheduling conflicts prevented Mishler from being at two places at the same time. (Tr. Vol. 2, p. 411.) Ezolt assisted Mishler, inter alia, in research and writing, appearing at pre-trials, and attending depositions. (Tr. Vol. 2, p. 412-414).

Mishler represented Bruce Walton in an employment law matter, filing an action on Walton’s behalf in the United States District Court for the Southern District of Ohio. At Mishler’s request, and due to a scheduling conflict, Mishler asked Ezolt to attend Walton’s

² Findings of Fact, Conclusions of Law and Recommendation (“Report”) of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (“Board”), p. 10.

³ See *Bd. of Comm. Op.* 2004-11, for a discussion of “of counsel” status and such counsel’s compliance with the Code of Professional Responsibility.

deposition in Columbus, Ohio. (Tr. Vol. 2, p. 477.) Ezolt attended Walton's deposition with Walton as well as the subsequent mediation in the Walton matter, also conducted in Columbus, Ohio, for which Ezolt billed Mishler for his (Ezolt's) time and expenses, (Tr. Vol. 1, p. 146, Tr. Vol. 2, p. 418-420, Rel. Ex. 33, 34), and which Mishler paid. Report 9, (Tr. Vol. 1, p. 148.)⁴ Ezolt had no further involvement and received no further payment from Mishler in connection with the Walton matter. (Tr. Vol 2, p. 420.)

The Board determined that Mishler's payment to Ezolt for Ezolt's time and expenses constituted an unauthorized "division of fees" in violation of DR. 2-107(A). For the reasons herein expressed, there was no "division of fees" between Mishler and Ezolt in the Walton matter, and the Board erred in its finding and conclusion that Misher breached DR 2-107(A).

Mishler's Payment of Ezolt's Time and Expenses Constituted Overhead Subsumed as Part of the Fee Agreement and Not the Improper Division of a Fee.

The evil for which DR 2-107(A) protects against is the brokering of clients, that is the payment of a "referral fee" to an attorney for having referred a client to another lawyer who will perform the services on behalf of the client. *Bd. of Comm. Op.* 91-5. Such clearly was not the case before the Board as the essence of the Mishler-Ezolt relationship was an accommodation borne from a scheduling conflict and Mishler's efforts to avoid delay in either of the two

⁴ The Board's Report at 9 mentioned that Walton was unaware that Ezolt would be present in lieu of Misher for the deposition and mediation (which both Misher and Ezolt disputed, e.g., Tr. Vol. 1, p. 145-146). This case was not tried on any presumption that Mishler violated a Disciplinary Rule for his having independently contracted with Ezolt, with or without Walton's knowledge or consent. Mishler further submits that this Court should draw no conclusion nor give any consideration to such issue as Mishler was neither charged with having violated a Disciplinary Rule nor was this matter tried upon any such claim.

important matters taking place at the same time at different locations in Ohio. The nature of Mishler's payment to Ezolt in Walton was an expense borne by Mishler, not a "division of fees."

The evidence presented to the Board demonstrated that Mishler's arrangement with and payment to Ezolt did not depend on the nature of the fee arrangement between Mishler and Walton. Of the considerations given to the Mishler-Ezolt arrangement, this Court should give significance to two: First, whether payment to Ezolt depended upon Mishler receiving payment from Walton (regardless of the fee arrangement between Mishler and Walton, i.e., hourly, fixed or lump sum, or contingent). Ezolt billed Mishler for his (Ezolt's) time and expenses for which Ezolt expected to and did get paid, and Ezolt expected payment regardless of the fee arrangement between Mishler and Walton, regardless of the outcome of the Walton matter, and regardless whether Mishler received any payment whatsoever.

The second consideration is that Mishler did not charge Walton for Ezolt's time; rather, such comprised part of Mishler's overhead expense subsumed by Mishler as part of the fee agreement with Walton.

To this writer's research, this issue is one of first impression to be presented to this Court.

As the facts were presented, *Columbus Bar Association v. Brooks*, 87 Ohio St.3d 344, 1999-Ohio-137, provides guidance in considering Ezolt's charges and Mishler's payment. In *Brooks*, this Court disapproved of the attorney having charged his client hourly fees for secretary and law clerk services, which terms were not specifically detailed in the contingency fee agreement with the client. *Brooks* set forth the propriety of billing a client for such services whether the fee agreement with the client is of an hourly or contingent nature:

Costs of litigation generally do not include secretarial charges or fees of paraprofessionals. Those costs are considered to be normal overhead subsumed in the percentage fee.

In cases where legal services are contracted for at an hourly rate, an attorney's secretarial costs, except in unusual circumstances and then only when clearly agreed to, are part of overhead and should be reflected in the hourly rate. If an attorney charges separately for a legal assistant, the legal assistant's hourly charges should be stated and agreed to in writing.

Brooks, 87 Ohio St.3d at 345-346. Here, Mishler did not charge Walton and Walton was not obligated to separately pay for Ezolt's services as an expense of litigation, i.e., court reporter's service, deposition transcript costs, or expert witness fee. The evidence demonstrated, without contradiction, that Mishler paid Ezolt as part of his (Mishler's) "normal overhead subsumed in the [fee agreement with Walton]."

Arranging for "backup"⁵ is common, especially among solo practitioners with a scheduling conflict or in need of assistance in the research or preparation of a pleading, memorandum, or document. In such circumstances, one attorney will call upon a colleague to attend a status conference, or a client's deposition, or may assist in research or drafting. This arrangement may be one for pay⁶ or frequently is an accommodation between friends and colleagues for which the attorney accommodated seeks to return the "favor" to the

⁵ Prof.Cond.Rule 1.3, mandating the attorney's reasonable diligence and promptness in representing a client, "may require that each sole practitioner prepare a plan" designating "backup" counsel in the event of death or disability. See, Prof.Cond.Rule 1.3, Comment [5].

⁶ Frequently advertised in legal publications, e.g., *Ohio Bar Reports*, are commercial solicitations, "contract counsel," seeking to assist with brief writing, appellate court assistance, trial preparation, etc., for which the client may be billed for such services.

accommodating friend or to another colleague when and where the need arises. Such accommodation evidences civility, professionalism, and professional courtesy between and among members of the bar.

Prior decisions by this Court as well as opinions rendered by the Board do not touch upon the situation presented herein as such other matters revolved around the relationship between the attorneys “dividing the fee” and the propriety thereof, and not whether there was a “division of fees.” E.g., *Dayton Bar Association v. Susco*, 89 Ohio St.3d 79; 2000-Ohio-446 (attorney publicly reprimanded for referring matters to another law firm in exchange for payment of one-third of the fee received, and the referring attorney did not notify his clients of the fee agreement with the other law firm and failed to obtain a written agreement from the clients concerning the division of fees), *Ohio State Bar Association v. Kanter*, 86 Ohio St.3d 554; 555, 1999-Ohio-122 (“DR 2-107(A) prohibits a division of fees by lawyers not in the same firm without, inter alia, the prior consent of the client [and] precludes the kickbacks * * *.”), *Bd. of Comm. Op.* 2003-3 (“When lawyers not in the same law firm agree to a division of legal fees under DR 2-107(A), based upon assuming responsibility for the representation rather than the proportion of services performed, each lawyer must assume responsibility for the representation through a written agreement signed by the client and each lawyer. Regardless of whether the division of fees is to be in proportion to the services performed or based upon assuming responsibility, each lawyer and client must sign a written disclosure of the terms of the division and the identity of all lawyers sharing in the fee.”), *Bd. of Comm. Op.* 91-9 (“It is the opinion of the Board that attorneys maintaining separate law practices within the same building are not lawyers in the

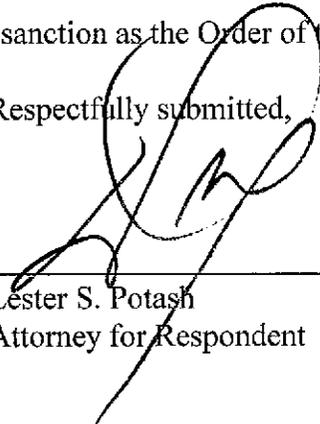
‘same firm’ for purposes of DR 2-107 (A). Therefore, these attorneys must comply with restrictions on division of fees contained within DR 2-107.”)

Conclusion

Throughout these proceedings and before the Hearing Panel, Respondent Howard V. Mishler acknowledged his misconduct in some of the charges and challenged other charges as brought by Relator. The Board issued its findings and conclusions based upon the Hearing Panel’s observation of the witnesses and evaluation of the evidence offered. The Board has submitted its recommended sanction of a twelve month suspension, with six months stayed, with other conditions of probation. Respondent accepts the Board’s recommended sanction which is more severe than the stayed two year suspension in *Warren County Bar Association v. Marshall*, 105 Ohio St.3d 59, 2004Ohio-7011, ¶14 (and Respondent herein fully cooperated with and assisted in this disciplinary proceeding).

WHEREFORE, Respondent Howard V. Mishler respectfully prays that this Court, upon its independent review of this record, sustain his Objection to the Report of the Board of Commissioners and adopt the Board’s recommended sanction as the Order of this Court.

Respectfully submitted,



Lester S. Potash
Attorney for Respondent

CERTIFICATE OF SERVICE

A true copy of the foregoing Objection of Respondent Howard V. Mishler has been deposited in the United States Mail, postage prepaid, this 22rd day of March, 2007, for service upon:

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